IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRYE-BRUHN CO., (a corporation).
Appellant,
vs.
HERMAN MEYER.
Appellee.
No. 842.

Upon Appeal from the United States District Court for Alaska, Division No. 1.

BRIEF OF APPELLEE.

MALONY & COBB.
Solicitors for Appellee.

Daily Dispatch Print, Juneau.

In The

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRYE-BRUHN CO., (a corporation). Appellant, vs. HERMAN MEYER. Appellee.	No. 842.

Upon Appeal from the United States District Court for Alaska, Division No. 1.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The appellant filed a bill in equity on the 21st day of March, 1902, against the appellee, setting out—

First. The recovery of a judgment by one C. H. Frye against the appellee in the Superior Court of King County, Washington, on the 28th day of June, 1899, for $3,140.10 and costs.

Second. The issuance of execution on the judgment and return of nulla bona in the state of Washington.

Third. An assignment of said judgment to appellant on the 27th day of January, 1900.

Fourth. That on —day of —, 1899, appellee commenced an action in the District Court of Alaska against appellant, and on the 21st day of March, 1902, recovered a judgment

therein for 45 per cent. of $6,295 after paying the costs of said action; that there is money in the hands of the clerk of the court, paid him by Frye Bruhn Co., sufficient to pay said judgment, and which the court had ordered paid thereon.

Fifth. That plaintiff [appellant] believes and alleges the fact to be that it will be unable to collect said judgment against appellee in the future; that appellee is either insolvent or has his property secreted so that it cannot be reached; that appellee has threatened to issue execution on his judgment; that he has threatened to assign his judgment, and will do some or all of these things unless restrained until appellant can establish his rights herein and the judgment recovered by it in King County be offset to the appellee's judgment.

A restraining order was prayed for restraining Meyer from assigning his judgment, and the clerk from paying the money in the registry of the court thereon; for judgment against Meyer for the amount of the King County judgment, and for general relief. (Rec. pp. 4 to 11,)

Jno. R. Winn filed his affidavit with this bill, from which it appeared that the fund in the hands of the clerk, payment of which to Meyer was restrained, was the proceeds of partnership property of appellant and appellee, which was sold under the orders of the court in the case of Frye Bruhn Co. vs. Meyer, and paid into the registry of the court to abide its decision; that the total fund to be divided between the partners was $6,295, less costs of suit, and that of that sum Meyer was entitled to 45 per cent., and there was enough money in the registry, to-wit: $3,857.50, to pay Meyer's part as decreed in the judgment. (Rec. pp. 12 and 13.)

A restraining order was issued as prayed for. (Rec. p. 14)

On April 11th Malony & Cobb, in their own behalf, moved the court to modify the restraining order to the extent of $1,000, asserting a lien to that extent on the money in the

hands of the clerk, as attorneys for Meyer in the suit wherein the money was deposited; and further alleging that the restraining order was improvidently issued, in that it appeared from the complaint that the court had no jurisdiction as a court of equity of the cause of action sued on; and that the complainant had no such interest in or lien upon the fund in court, the payment of which was restrained, as would entitle it to the relief prayed for. [Rec. p. 19.]

With this motion was filed the affidavit of J. H. Cobb, setting forth an agreement between Malony & Cobb and Meyer to pay them $1,000 out of said fund. [Rec. p. 20.]

This motion was granted [Rec. p. 22], and from this order this appeal is taken.

There are two assignments of error:

First, That the court erred in hearing the motion of Malony & Cobb at all.

Second, In granting the order to modify the injunction. [Rec. p. 31.]

Council for appellant have refused to serve their brief if they have prepared one, and we are consequently unenlightened as to the position they will take and the authorities they will cite. In the event the court shall consider the appeal at all, we therefore proceed to show that the order appealed from was right.

We concede at the outset that if the bill had stated facts that entitled the plaintiff to any relief, Malony & Cobb would have been driven to a bill of intervention to protect their rights in the fund in court. But if the bill stated no such facts, and the restraining order was wrongly issued in the first place, the court rightly modified it, to the extent that it interfered with their rights on their motion. Indeed, the court might rightly have dissolved the restraining order instead of modifying it.

A consideration of the bill and the accompanying affidavit, shows that it is not a case of set-off at all. It is nothing more nor less than a bill brought to reach a fund in the registry of the court and awarded to Herman Meyer, and have it applied upon the judgment to be obtained on the judgment of the King County court. Reduced to its simplest terms the court is asked to do three things: 1st, to hold by a restraining order Meyer's money in court until the King County judgment is merged into a judgment in the District Court of Alaska; 2nd, to render judgment for appellant against Meyers on the King County judgment, and, 3rd, to then appropriate the money of Meyer in the registry of the court to the payment of this judgment. In orther words, it is a creditor's bill to reach a certain asset of the defendant, and as such it cannot be maintained, for these reasons.

A judgment of another state cannot be made the basis of a creditor's bill. It must be sued over before it becomes a judgment for the purpose of any relief, either at law or in equity.

Claflin vs. McDermott, 12 Fed., 375.

National Tube Works vs. Ballou, 147 U. S., 517.

Union Trust Co. vs. Boker, 89 Fed., 6.

United States vs. Eisenbeis, 88 Fed., 4.

In the latter case, a bill was filed to reach money in the hands of the court, and awarded to the defendant in a domestic judgment of the state of Washington. Insolvency of the debtor was alleged, and also a lien upon the fund. After deciding that the facts alleged failed to show a lien, Judge Hanford dismissed the bill, one of the grounds being that it failed to show that plaintiff had exhausted his legal remedies.

Here the plaintiff has never pursued his legal remedies according to his own showing. As is said in the cases cited above, the holder of a foreign judgment is a mere creditor at large. He should sue at law on his judgment and endeavor to collect it by execution. Until he has done that he has no standing to invoke equitable relief. We respectfully submit that the order appealed from is right and should be affirmed.

MALONY & COBB,

Solicitors for Appellee.